IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.1272 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B. ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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MUKESHBHAI BAGADRIRAM @ GHANSHYAM TULSIRAM & ANR. - Appellants

Versus

STATE OF GUJARAT - Respondent

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Appearance :
MR RAM NANDAN SINGH, learned Advocate for Appellants.
MR ND GOHIL, learned APP for Respondent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 12/09/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against judgment dated October 1, 1999 rendered by the learned

Additional Sessions Judge, Panchmahals at Godhra, in Sessions Case No.3 of 1999 by which the two appellants are convicted under Sections 17 and 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (“the Act” for short) and each sentenced to R.I. for twelve years and fine of Rs.1,50,000=00, in default R.I. for three years, separately for commission of offences punishable under Sections 17 and 18 of the Act.

2. The facts emerging from the record of the case are as under:

On or about May 19, 1998, Mr.B.C.Bhandari was discharging duties as Police Sub Inspector of Halol Police Station. On May 26, 1998, he was directed by District Superintendent of Police, Godhra, to check vehicles passing on the Highway. Accordingly, he was checking vehicles with his staff near “Velly Hotel”. At about 4.30 P.M., two persons riding a Hero-Honda motor-cycle of red colour without registration number, at a high speed, were spotted. Therefore, Mr.Bhandari and two policemen accompanying him signaled the riders of the motor-cycle to stop. The signal given by Mr.Bhandari and Policemen accompanying him was ignored by the riders and

they fled away. Therefore, Mr.Bhandari with his staff members chased them in a jeep by proceeding from Baska to Rameshwara Village. Mr.Bhandari noticed that the motor-cycle skidded while taking a turn near the factory known as “Vijay Industrial Company” and fell on the road. He also noticed that both the riders were thrown off and had started running. In order to apprehend the riders, PSI Mr.Bhandari fired two shots in air from his service revolver. On hearing the fire-shots, the riders, who were attempting to make their escape good, stopped. They were brought by the Policemen accompanying Mr.Bhandari near the motor-cycle, which was lying on the road. The dickey of the motor-cycle was found open and it was noticed that bags containing black substance were placed in the dickey. Mr.Bhandari decided to search motor-cycle and offered to search the motor-cycle in presence of a gazetted officer or a magistrate if so desired by the appellants. The appellants desired that the motor-cycle be searched in presence of a gazetted officer. Mr.Bhandari, therefore, requested Mr.M.S.Deedor, who was then Mamlatdar & Executive Magistrate, Halol, to come to the spot where the motor-cycle was lying so that the same could be searched in his presence. Accordingly, Mr.Deedor arrived at the place where the motor-cycle was

lying. Services of another panch-witness, namely, Mr.Ashokkumar Ramanlal Shah, were also requisitioned. Thereafter, the dickey attached to the motor-cycle was searched. The search resulted into find of four plastic bags containing opium. It was necessary to weigh the substance found and, therefore, Jayantilal Viththaldas Modi, who was a vegetable vendor, was summoned at the place with weights and scale. He came at the place with weights and scale and weighed the substance found from the dickey of the motor-cycle. The total weight of the substance found was ascertained to be 5 Kgs. 500 Gms.. Mr.Bhandari demanded pass or permit from the appellants authorizing them to possess opium. No such pass or permit could be produced by any of the appellants. As the substance found was, *prima facie,* ascertained to be opium, four samples, each weighing about 500 Gms., were prepared. The quantity of the opium taken out for analysis was placed in a plastic bag, mouth of which was tied with a twine. The plastic bag was thereafter placed in a box which was tied with twine. Thereafter, the slip bearing signature of panch witnesses and Mr.Bhandari were affixed thereon and the four samples were sealed. Mr.Bhandari lodged his complaint against the appellants for commission of offences punishable under the Act.

Mr.Bhandari also handed over the complaint, panchnama, *muddamal,* accused, etc. to the Police Officer in charge of Halol Police Station. Initially, the complaint lodged by Mr.Bhandari was investigated by himself. However, the Divisional Police Officer directed Mr.M.F.Baria, who was then PSI of Halol Police Station to investigate the complaint of Mr.Bhandari. Accordingly, investigation was taken over by Mr.Baria. During the Course of investigation, Mr.Baria was transferred and, therefore, further investigation into the case was made by Mr.Pawar. During the course of investigation, statements of those persons, who were found to be conversant with the facts of the case, were recorded. The four samples were sent to F.S.L. for analysis. The report of the analysis indicated that substance analyzed was opium within the meaning of the Act. On completion of investigation, Mr.Pawar chargesheeted the appellants in the Court of learned Judicial Magistrate First Class, Halol, for commission of offences punishable under Sections 8(c), 17, 18 and 49 of the Act.

3. As the offences punishable under the Act are exclusively triable by a Special Court, the case was committed to the Special Court, Panchmahals at Godhra,

for trial where it was numbered as Sessions Case No.3 of 1999. The learned Additional Sessions Judge to whom the case was made over for trial framed necessary charge against the appellants at Exh.2. It was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) Manharkumar Shakjibhai Deedor as P.W.-1 at Exh.7; (2) Chemical Examiner from F.S.L. Smt. Shobhnaben Hitendrabhai as P.W.-2 at Exh.10; (3) Scientific Expert Mr.Bipinbhai Durlabhjibhai Davla, who had analyzed the substance sent to F.S.L. as P.W.-3 at Exh.12; (4) Police Constable Ganpatsinh Jaisinh as P.W.-4 at Exh.15; (5) Panch Mahendrabhai Chimanbhai as P.W.-5 at Exh.16; (6) Jayantilal Viththalbhai Modi as P.W.-6 at Exh.17; (7) PSI Mr.Bharatkumar Chimanlal Bhandari as P.W.-7 at Exh.18; and, (8) PSI Mr.Mohansinh Fatesinh Baria as P.W.-8 at Exh.20, to prove its case against the appellants. The prosecution also produced documentary evidence such as panchnama indicating search of dickey of motor-cycle, which was driven by the appellants as well as find of opium therefrom at Exh.8; report given by Smt.Shobhnaben Hitendrabhai at Exh.11; forwarding letter with which the report of the analysis was sent by Scientific Expert Mr.Davla at Exh.13; report of the analysis at Exh.14;

complaint lodged by Mr.Bhandari at Exh.19; etc. in support of its case against the appellants.

4. After recording of the evidence of prosecution witnesses was over, the learned Judge of the trial Court explained to the appellants the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. Both the appellants claimed in their respective further statement that Jayantilal Viththaldas Modi and Ashokbhai Ramanlal Shah were stock-witnesses of the police and were in the habit of giving false deposition before the Court and, therefore, they should be acquitted as they were innocent. However, no defence evidence was adduced by any of them.

5. On appreciation of evidence led by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the appellants were found in possession of 5Kgs. & 500 Gms. of opium without pass or permit on May 26, 1998 and, therefore, commission of offences by them punishable under Sections 8(c), 17, 18 and 49 of the Act was

established. The learned Judge noticed that the samples were properly sealed and sent to F.S.L. and that there was no possibility of tampering with the same before the samples were analyzed. The learned Judge deduced that mandatory provisions of the Act were complied with and that the appellants were not entitled to any benefit of doubt on the ground that the mandatory provisions of the Act were not complied with by Mr.Bhandari. In view of abovereferredto conclusions, the learned Judge has convicted the appellants under Sections 8(c), 17, 18 and 49 of the Act and imposed sentences referred to earlier by judgment dated October 1, 1999 giving rise to instant appeal.

6. Mr.R.N.Singh, learned counsel of the appellants, contended that Section 8(c) of the Act prohibits production, manufacture, possession, sale, purchase, transport, warehousing, use, consumption, import inter-State, export inter-State, import into India, export from India or transit of any narcotic drug or psychotropic substance, but it does not prescribe any punishment therefor and, therefore, the learned Judge was not justified in convicting the appellants under Section 8(c) of the Act. It was pointed out that Section 49 of the Act deals with power to stop and search conveyance, but it

does not prescribe any punishment by itself and, therefore, unwarranted conviction of the appellants under Section 49 of the Act should also be set aside. It was argued that the offending substance namely opium was found from the possession of the appellants on May 26, 1998, but the four samples drawn were sent to F.S.L. on June 10, 1998, i.e. after unreasonable delay of fourteen days and as the delay in sending the samples to F.S.L. is not explained by any of the prosecution witnesses at all, the appellants should be granted reasonable benefit of doubt arising from the facts of the case when it is not satisfactorily established by the prosecution that a particular seal bearing particular impression was applied on any of the four samples. The learned counsel of the appellants contended that though the *muddamal* was handed over in Halol Police Station on May 26, 1998, no entry made in any register nor copy of the register is produced by the prosecution indicating that *muddamal,* panchnama, complaint, accused, etc. were handed over for safe custody nor any evidence is adduced by the prosecution to establish that the *muddamal* was kept in safe custody till June 10, 1998 on which day it was sent to F.S.L. for analysis nor the Police Officer, who had delivered the *muddamal* to F.S.L. for analysis is examined and as possibility of tampering with *muddamal* is not

ruled out, the appellants should be granted reasonable benefit of doubt. The learned counsel argued that difference in weight of *muddamal* drawn and weight of *muddamal* as mentioned in F.S.L. report being substantial, the prosecution case should be disbelieved by holding that *muddamal* seized was not sent to F.S.L. for analysis. It was contended that mandatory provisions of Section 50 of the Act were not complied with as search was not made in presence of a gazetted officer though so demanded and, therefore, the appeal should be accepted. According to the learned counsel of the appellants, non-preparation and/or production of arrest panchnama of any of the appellants before the Court or non-production of seal used for the purpose of sealing the samples before the Court or non-production of entry and/or register indicating safe custody of the *muddamal* for fourteen days should be regarded as serious infirmities in prosecution case entitling the appellants to reasonable benefit of doubt and, therefore, the impugned judgment should be set aside. What was maintained by the learned counsel of the appellants was that it was specifically stated by almost all the prosecution witnesses that the motor-cycle, which was driven by the appellants contrary to the direction given by Mr.Bhandari, was red coloured whereas the evidence on record shows that what was sold

by the authorised dealer was motor-cycle having black colour and as Mr.Nandlal Jogi, who was involved in instant case, was neither arrested nor prosecuted, the investigation in the case can hardly be regarded as fair one and in view of several discrepancies pointed out earlier, the appeal should be accepted. According to the learned counsel of the appellants, the learned Judge of the trial Court has failed to appreciate the evidence on record in its true perspective and, therefore, the appeal should be allowed.

7. Mr.N.D.Gohil, learned Additional Public Prosecutor for the State Government, contended that the report of the analysis produced by the prosecution at Exh.14 in no uncertain terms mentions that seals on the *muddamal* were found to be intact and, therefore, so-called delay should not be considered fatal to the prosecution case as is sought to be made out by the learned counsel of the appellants. It was argued that all the witnesses have clearly and categorically stated before the Court that *muddamal* seized was sealed whereas seal applied on *muddamal* was found having impression of 'Police Sub Inspector, Halol' in English language, which is quite evident from the contents of the report of analysis and, therefore, non-description of seal applied

on *muddamal* by the prosecution witnesses is hardly of any importance. The learned counsel of the State Government referred to the testimony of different witnesses examined by the prosecution to bring his point home that the appellants were the persons, who were driving the motor-cycle when it was sought to be intercepted, and pleaded that difference in colour of the motor-cycle would not entitle them to any benefit of doubt. It was argued that non-production of panchnama of arrest or seal, which was used for the purpose of sealing *muddamal* before the Court, would not indicate that the incident in question had not taken place or that the appellants were not arrested with reference to the offences punishable under the Act or that *muddamal* was not sealed and, therefore, those factors should not be taken into consideration by the Court while determining the guilt or otherwise of the appellants. The learned counsel of the State argued that no raid was carried out on prior information by PSI Mr.Bhandari and as PSI Mr.Bhandari had accidentally found offending substance, non-compliance of Section 50 of the Act is of no consequence. The learned counsel of the State Government argued that in view of reliable, cogent and clear evidence adduced by Mr.Bhandari that *muddamal* sealed was kept in safe custody at Halol Police Station and that the same was handed over to F.S.L. for

analysis intact, non-production of register indicating receipt of *muddamal* and safe custody of the same at the Police Station should not be given undue importance by the Court. The learned counsel argued that the evidence on record would indicate that roughly about 500 gms. of opium was collected in plastic bag for sending the same to F.S.L. by a vegetable vendor and, therefore, discrepancies in weight as found in the report of the F.S.L. is of little importance. According to the learned Additional Public Prosecutor for the State, cogent and convincing reasons have been assigned by the learned Judge of the trial Court for convicting the appellants under Sections 17 and 18 of the Act and as the learned counsel of the appellants has failed to dislodge them, the appeal which lacks merits should be dismissed.

8. This Court has heard Mr.R.N.Singh, learned counsel of the appellants, and Mr.N.D.Gohil, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. The plea that difference in weight of samples drawn by Mr.Bhandari and actual weight found by F.S.L. would indicate that *muddamal* seized was not sent to F.S.L. for analysis cannot be accepted. A fair reading of the evidence on record indicates that the quantity of the *muddamal* was weighed by a vegetable vendor and he had no weighing machine like electronic weighing machine, which would show exact weight of the samples drawn. When a vegetable vendor weighs *muddamal* with his own scale and weights, which are normally used for the purpose of selling vegetables, difference in weight is bound to be noticed if the same article is weighed in Laboratory. Therefore, difference in weight cannot have the consequence as suggested by the learned counsel of the appellants.

10. Similarly, the plea that Section 50 of the Act was not complied with and, therefore, the appellants are entitled to acquittal was rightly given up when it was pointed out to the learned counsel of the appellants that what was searched was dickey of the motor-cycle and not person of any of the appellants and that Section 50 of the Act would not be applicable in view of authoritative pronouncement of law by the Supreme Court on the point in **State of H.P. vs. Pawan Kumar, (2005) 4 SCC 350.**

11. However, there is no manner of doubt that no definite evidence is led by the prosecution to establish as to which seal was applied by Mr.Bhandari on the four samples which were prepared on the spot. Mr.Bhandari in his substantive evidence before the Court has merely stated that *muddamal* samples were sealed, but he has not stated as to which seal was used or seal was bearing which impression. The description of the seal used is also not given either in the panchnama produced by the prosecution at Exh.8 or in the complaint lodged by Mr.Bhandari, which is produced at Exh.19. The particulars of the seal used are also not given by witness Mr.Manharkumar Shakjibhai Deedor, who was then Executive Magistrate and had acted as one of the panch-witnesses. Normally, the particulars of seal applied on *muddamal* should be furnished by the prosecution so that the Court can satisfy itself that the seal, which was found by the F.S.L., was the same which was applied on *muddamal* article. The scrutiny of evidence on record makes it very evident that no evidence worth the name is adduced by the prosecution to establish that a particular seal having particular impression was used by Mr.Bhandari while sealing the *muddamal* articles. This fact by itself may not be fatal to the prosecution case and cannot

always be regarded as having vitiating effect on the prosecution case. However, this fact will have to be viewed in the light of another important fact that sealing procedure adopted by Mr.Bhandari was not foolproof. It is mentioned in the panchnama that in order to prepare samples, roughly 500 Gms. of opium was taken out from each plastic bag and samples were thereafter placed in different plastic bags. It is further mentioned that, thereafter, mouth of each plastic bag was tied with a twine after which bags were placed in different boxes on which slips bearing signatures of panch-witnesses were affixed and, thereafter, seals were applied. It means that none of the plastic bags in which the *muddamal* was kept, was heat-sealed. The seals on bags could have been removed at any point of time and substance kept in the plastic bags could have been tampered with by untying the knot. Therefore, it is very clear that foolproof sealing procedure was not adopted by Mr.Bhandari while preparing four samples.

12. Above referred to two important facts will have to be considered in the light of another glaring fact that offending substance was found from the dickey of motor-cycle, which was driven by the appellants on May 26, 1998, but the four samples drawn on that day were

sent to F.S.L. for analysis only on June 10, 1998, i.e. after unreasonable delay of fourteen days. No explanation could be offered by any of the prosecution witnesses as to why *muddamal* was kept lying at the Police Station for fourteen days and why the same could not be dispatched to F.S.L. promptly. It is relevant to notice that Mr.Bhandari has not stated in his evidence that he had handed over *muddamal* to P.S.O. of Halol Police Station for safe custody nor it is so stated by Police Constable Ganpatsinh Jaisinh, who is examined at Exh.15. No Police Officer of Halol Police Station is examined by the prosecution to establish that he was handed over *muddamal* by P.S.I. Mr.Bhandari and that he had kept the same in safe custody before it was dispatched to F.S.L. for analysis. Neither any entry made in the register maintained at the Police Station is produced by the prosecution to indicate that *muddamal* handed over by Mr.Bhandari was received by a particular person for safe custody nor any such register is produced for perusal of the Court. The Supreme Court in **State of Rajsthan vs. Gurmail Singh, (2005) 3 SCC 59,** had occasion to notice certain infirmities in prosecution case. In the said case, it was found that it was claimed that the seized articles were kept in *malkhana* on May 20, 1995 till it was taken over on June 5, 1995, but *malkhana* register was

not produced in support thereof. It was further found that no sample of seal was sent along with the sample to Excise Laboratory for comparing with the seal appearing on sample bottles. After noticing the infirmities, the Supreme Court held that there was no evidence to prove that the seals found were the same as were put on the sample bottles immediately after seizure of the contraband articles and that link evidence adduced by the prosecution was not satisfactory and in view of the loopholes in the prosecution case, the High Court was justified in acquitting the respondent. In this case also, the Court finds that the infirmities noticed above make the prosecution case doubtful that *muddamal* seized was the same which was sent to F.S.L. for analysis and loopholes noticed are serious. Further, no evidence is led by the prosecution as to who had carried the *muddamal* to F.S.L. and what was the condition of the *muddamal*.

13. It is further relevant to notice that no arrest panchnama of any of the appellants was prepared by Mr.Bhandari after find of contraband items from the dickey of the motor-cycle, which was driven by the appellants nor any note thereof was made in Police Station. It is his case that on seeing the members of the police party, the appellants had started running away and

in order to apprehend them, he had fired two shots in air from his service revolver, but it is an admitted position that neither empty cartridges could be traced nor any evidence could be produced by him that he had notified this fact before his immediate official superior.

14. According to Mr.Bhandari, the colour of the motor-cycle, which was driven by the appellants, was red, but the documents, which are produced by Investigating Officer Mr.Baria, would indicate that the colour of the motor-cycle was black. The documents produced by Mr.Baria would indicate that the vehicle in question was purchased by one Mr.Jaiprakash Hariprasad Mehta. However, the prosecution has not led any evidence to indicate as to how the appellants or any of them was concerned with the said vehicle of Mr.Mehta. It is not the case of the prosecution that the vehicle was stolen by the appellants nor it is the case of the prosecution that the owner had permitted the appellants to ride the vehicle nor it is the case of the prosecution that the owner was also involved in the commission of offences punishable under the Act. Therefore, it is not satisfactorily established by the prosecution that the appellants or any of them was in possession of the vehicle in question. What is relevant to notice is that Investigating Officer

Mr.Baria in his testimony, which is recorded at Exh.20, has, in terms, stated that during the course of investigation of the complaint lodged by Mr.Bhandari, he had visited State of Madhya Pradesh as it had transpired that the appellants were supplied opium by one Nandlal Jogi and that from that Nandlal Jogi, offending articles were found. However, it is an admitted position that said Nandlal Jogi was neither apprehended nor prosecuted with the appellants. There are many unexplained loose ends in the prosecution case and on re-evaluation of evidence on record, this Court is of the opinion that the appellants would be entitled to reasonable benefit of doubt arising from the facts of the case. The appeal, therefore, will have to be accepted.

For the foregoing reasons, the appeal succeeds. Judgment dated October 1, 1999 rendered by the learned Additional Sessions Judge, Panchmahals at Godhra, in Sessions Case No.3 of 1999 convicting each appellant under Sections 17 and 18 of the Act and sentencing each of them to R.I. for twelve years and fine of Rs.1,50,000=00, in default R.I. for three years, separately for commission of offences punishable under Sections 17 and 18 of the Act, is hereby set aside. Instead the appellants are acquitted. The respondent is

directed to set each appellant at liberty forthwith unless presence of the appellants or any of them is needed in Jail with reference to any other case. Muddamal to be disposed of in terms of directions by the learned Judge of the trial Court in the impugned judgment. Direct Service is permitted.

[J.M.PANCHAL, J.]

[H.B.ANTANI, J.]

Rajendra